80-983

No.

Supreme Court, U. S.
FILED
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MICHAEL RODAK, JR., CLERK

SUPREME COURT OF THE UNITED STATES

October Term, 1980

UNITED STATES STEEL CORPORATION - - - - - Petitioner

versus

BRUCE W. CHRIST - - - - Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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QUESTION PRESENTED

Whether the lack of service of process over the head of a federal agency prevents a United States District Court from deciding whether evidence withheld by a subordinate agency official in response to the court's subpoena is privileged.

Should the Court grant review, Petitioner may ask the Court to review as well the validity of the asserted governmental privilege.

PARTIES

Only United States Steel Corporation and Dr. Bruce W. Christ, through his employer the National Bureau of Standards-Department of Commerce, were parties to the proceedings before the Court of Appeals for the Tenth Circuit. Because those subpoena proceedings arose from consolidated lawsuits in the United States District Court for the Western District of Kentucky, the caption of the Kentucky suits has been used in the District of Colorado and the Court of Appeals.

None of the parties to the Kentucky suits, save Petitioner, appeared in the Colorado proceedings. For clarity, however, Petitioner has served those parties with this Petition and lists them in accordance with Rule 21.1 of this Court.

Eugene E. Morris
Jack B. Kelley, Inc.
R. W. Hunt Company
Western Sales & Testing, Inc.
Liquid Transporters, Inc.
Commercial Heat Treating Company
Gobel Mattingly
Compressed Gas Corporation
R & R Engineering Co., Inc.
Allied Eastern Corporation
Quietaire Corporation
Spartan Enterprises
Intrastate Gathering Corporation

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United States ex rel Touhy v. *Ragen*, 340 U. S. 462..4, 7, 8

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Act of March 3, 1901, 31 Stat. 1450, 15 U.S.C. 277.. 2
Act of September 6, 1966, 80 Stat. 379, 5 U.S.C. 301. 2
Policies and Procedures Governing the Appearance of NBS Employees as Witnesses in Private Litigation, 15 CFR, Part 275 .....2, 4, 6
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29 CFR § 102.118 10
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49 CFR, Part 835 9

SUPREME COURT OF THE UNITED STATES

October Term, 1980

No.

UNITED STATES STEEL CORPORATION, - *Petitioner*

v.

BRUCE W. CHRIST, - - - - *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

United States Steel Corporation petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra,* pp. 1a-2a) is unreported. The order of the court of appeals denying rehearing or rehearing *en banc* (App. C, *infra,* pp. 12a-13a) is unreported. The opinion of the district court (App. B, *infra,* pp. 3a-11a) is unreported.

JURISDICTION

The judgment of the court of appeals (App. A, p. 2a) was entered August 12, 1980. The order denying the timely motion for rehearing and suggestion for

rehearing *en banc* (App. C, p. 12a) was entered September 11, 1980. The jurisdiction of this Court is invoked under 28 USC 1254(1).

STATUTES AND REGULATIONS INVOLVED

The Act of March 3, 1901, 31 Stat. 1450, as amended, 15 U.S.C. 277, provides:

> The Secretary of Commerce shall, from time to time, make regulations regarding the payment of fees, the limits of tolerance to be attained, standards submitted for verification, the sealing of standards, the disbursement and receipt of monies, and such other matters as he may deem necessary for carrying this chapter into effect.

The Act of September 6, 1966, 80 Stat. 379, as amended, 5 U.S.C. 301, provides:

> The head of an executive department or military department may prescribe regulations for the government of his department, the conduct of its employees, the distribution and performance of its business and the custody, use, and preservation of its records, papers, and property. This section does not authorize withholding information from the public or limiting the availability of records to the public.

The applicable regulations of The National Bureau of Standards, 15 CFR Part 275 (Policies and Procedures Governing the Appearance of NBS Employees as Witnesses In Private Litigation), are of considerable length, and have therefore been reproduced as Appendix D to this Petition.

STATEMENT

United States Steel Corporation (U. S. Steel) was sued for damages in the United States District Court for the Western District of Kentucky following an explosion of a compressed gas cylinder it manufactured. Federal jurisdiction of the suit, and the consolidated suits by U. S. Steel for indemnity and contribution, arise under 28 U.S.C. 1332. App. B, pp. 3a, 4a.

In pre-trial of the Kentucky suits, and over U. S. Steel's objection, the District Court admitted into evidence a report of the explosion prepared by Dr. Bruce W. Christ and published by his employer, the National Bureau of Standards, United States Department of Commerce. App. B, p. 4a.

Following admission of Dr. Christ's report, Petitioner made a request for his testimony by deposition and production of related papers pursuant to 15 CFR 275.4 (1979), a regulation of the National Bureau of Standards. The Legal Advisor of NBS denied Petitioner's request under authority of 15 CFR 275.5(a). App. B, p. 5a.

Petitioner then requested and obtained a subpoena of Dr. Christ for testimony by deposition and production of documents in the District Court for the District of Colorado, Dr. Christ's residence and place of work. The subpoena was issued and served under the authority of Rule 45(d)(1), Fed. R. Civ. P. Petitioner was then notified by the Legal Advisor that Dr. Christ would refuse to testify or produce documents in compliance with the subpoena. Counsel for Petitioner and

the Legal Advisor thereupon entered into a stipulation to that effect, preserving Petitioner's right to seek an order from the District Court for Colorado compelling compliance with the subpoena. App. B, p. 5a.

Upon Petitioner's motion to compel compliance, and the objections of the National Bureau of Standards to its enforcement, the District Court ultimately ordered compliance by Dr. Christ. In so doing, the District Court held that the regulation contained in 15 CFR Part 275 was promulgated in excess of statutory authority. App. B, pp. 10a, 11a.

On expedited appeal to the United States Court of Appeals for the Tenth Circuit, the District Court's decision was reversed with instructions to dismiss all proceedings in the District Court for Colorado. App. A, p. 2a. Petitioner's motion for rehearing and suggestion for a rehearing en banc were denied by the Court of Appeals. App. C, pp. 12a-13a.

The decision of the Court of Appeals, effectively quashing the subpoena served on Dr. Christ, was based on the Court's conclusion that it was controlled by *United States ex rel. Touhy* v. *Ragen,* 340 U. S. 462 (1951), and its prior decision in *Saunders* v. *The Great Western Sugar Company,* 396 F. 2d 795 (10th Cir. 1968). The Court of Appeals thus did not reach the issue decided by the District Court, that is whether the regulation of the NBS barring testimony and production of documents by its employees in most instances is a valid exercise of statutory authority. App. A, p. 2a. Rather, the Court of Appeals upheld

Dr. Christ's reliance on the NBS regulation for his refusal to obey the subpoena.

The inference from *Saunders* is that the validity of the privilege asserted in this instance can be tested only in response to a subpoena served on the Director of the National Bureau of Standards, not one of his subordinate officials. Petitioner must therefore obtain a subpoena from a district court having jurisdiction over the Director of NBS, presumably the United States District Court for the District of Columbia.

Only Petitioner and Dr. Christ, through government counsel, are parties to the proceedings in the United States District Court for the District of Colorado and the Court of Appeals for the Tenth Circuit. Petitioner has, however, included all parties to the underlying suits in the District Court for the Western District of Kentucky. None of those parties has appeared in the Court of Appeals below, nor do we anticipate their appearances in this Court should the Writ of Certiorari be granted.

REASONS FOR GRANTING THE WRIT

The judgment of the Court of Appeals for the Tenth Circuit conflicts directly with the law prevailing in the Court of Appeals for the Fifth Circuit. Moreover, the judgment below presents a probable departure from a principle established by this Court in *United States* v. *Reynolds,* 345 U. S. 1 (1953). These conflicts affect directly similar regulations enforced by numerous federal agencies which limit or

prohibit testimony and release of documentation by governmental officials. Review of the instant judgment by the Court of Appeals would therefore be appropriate because of the national significance and timely nature of the issue.

The Court of Appeals has refused to enforce a lawfully-issued subpoena on the ground that a subordinate official of the National Bureau of Standards may rely on the NBS regulation (15 CFR Part 275, App. D, *infra.*) irrespective of whether the governmental privilege claimed in that regulation is valid or invalid. The person needing the testimony of that subordinate may not challenge the validity of the agency privilege except by an action against the head of the agency in the place of the director's residence, presumably the District of Columbia. In the facts of this case, moreover, that rule applies even if the personal observations and qualifications of the subordinate are the matters sought, and that subordinate resides in Colorado and is without the jurisdiction of any court in the District of Columbia.

The Court of Appeals accepted the position of the government that Petitioner must subpoena the Director of NBS where process will reach him in order that *he* may assert the privilege and defend its validity. Presumably if Petitioner then prevails in the ensuing litigation in the federal courts of the District of Columbia—and potentially this Court on final review—Petitioner must then return to the district court with jurisdiction of Dr. Christ to obtain a subpoena for his appearance and testimony. In other words, in no

instance may the National Bureau of Standards be required to defend the asserted privilege except in defense of the agency's director, wherever process can reach him.

I. The judgment below cannot be reconciled with the law prevailing in the Court of Appeals for the Fifth Circuit. The opinion below explains its reasoning by reference to its prior decision, *Saunders* v. *The Great Western Sugar Company,* 396 F. 2d 794 (10th Cir. 1968) and *United States ex rel. Touhy* v. *Ragen,* 340 U. S. 462 (1951). In Saunders, the court held that local—*i.e.,* Colorado—officials of the Small Business Administration could refuse to comply with a subpoena duces tecum for SBA records in reliance on an SBA regulation similar to that of the NBS. The court felt bound by the decisions in *Ragen, supra* (Department of Justice regulations), and *Boske* v. *Comingore,* 177 U. S. 495 (1900) (Treasury Department regulations). Its conclusion from those opinions required the private litigant to leave the district court in which the anti-trust suit was pending and seek the needed documents in Washington:

> We assume that the proper SBA official in the District of Columbia can be reached by legal process and that the claim of privilege can be promptly determined there.

Saunders, supra, 396 F. 2d at 795. The basis of the Court of Appeals' decision here is, by its terms, that explained in *Saunders,* and it is that reasoning which Petitioner asks this Court to review.

The same question was decided against the government by the Court of Appeals for the Fifth Circuit in *N.L.R.B.* v. *Capitol Fish Company,* 294 F. 2d 868 (5th Cir. 1961). The Trial Examiner sustained the refusal by the General Counsel of the National Labor Relations Board to permit the defendant to interrogate an N.L.R.B. attorney. The Court of Appeals held that order to be reversible error. Contrary to the ruling in *Saunders,* the Fifth Circuit's opinion construed precedent as authorizing consideration of the agency privilege in the district having jurisdiction over the prospective witness:

> It seems to us, however, that when a party has filed a request for evidence or testimony and the request can be properly denied only if the evidence or testimony is privileged, the question of privilege is as squarely raised by an unexplained refusal to comply as by an express claim of privilege, and the court must decide the question.

294 F. 2d at 875. Fully cognizant of the holding of this Court in *Ragen, supra,* the Fifth Circuit recognized a modification of *Ragen's* holding in *United States* v. *Reynolds,* 345 U. S. 1. The court of appeals noted that in *Reynolds* a similar assertion of privilege was considered and upheld in part, although the Secretary of the Air Force had not been served with process by the federal district court in Philadelphia. 294 F. 2d at 874. Its understanding of *Reynolds'* effect is informative.

> Although the Reynolds decision, decided two years after Ragen, does not expressly conflict with the

> latter, it does seem to overrule the suggestion in Ragen that the lack of service of process over the department head prevents a court from deciding whether evidence withheld by a subordinate is privileged.

Id. This reasoning and the holding in *Capitol Fish Co.* were reaffirmed in *Swanner* v. *United States,* 406 F. 2d 716, 719 (5th Cir. 1969). *Accord, Rosee* v. *Board of Trade,* 35 F.R.D. 512 (N.D. Ill. 1964)[1]; *McFadden* v. *Avco Corp.,* 278 F. Supp. 57 (M.D. Ala. 1967).

A direct conflict between the Court of Appeals' judgment below and the law prevailing in the Fifth Circuit is evident. If the opinion in *Capitol Fish* is correct—and we suggest that it is—the ruling below also cannot be squared with this Court's decision in *United States* v. *Reynolds.* In these circumstances, review in this Court is strongly suggested.

II. Petitioner's predicament is not an isolated one, but is faced by private litigants in need of evidence or testimony from any of several federal agencies. Federal agencies which prohibit or otherwise impede access to testimony and material of employees include the following: The National Transportation Safety Board (49 CFR Part 835); the National Oceanic and Atmospheric Administration (15 CFR Part 909); the Office

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[1]The court in *Rosee,* 35 F.R.D. at 514, put it this way:

> [N]o purpose is served by requiring that the request be made again, directly to the department head. The claim of privilege is as squarely raised by instructing the subordinate to communicate the Secretary's determination to the Court as by an express claim made directly by the Secretary.

of the Comptroller of Currency (12 CFR Part 5); the National Labor Relations Board (29 CFR §102.118); the Department of Transportation (49 CFR Part 9); and other arms of the Executive Branch.[2]

Among federal agencies that restrict access to testimony and records in this manner are agencies responsible for testing and analysis of products and scientific investigations of accidents, unsafe conditions and the like. For example, the National Transportation Safety Board is responsible for investigating accidents relating to aircraft, pipelines, railroads, maritime operations and others. 49 USC 1903; 49 USC 1441. The investigation and analysis performed by Dr. Christ was performed pursuant to 15 USC 273 and 278.

Those evaluations and reports are frequently critical to assessment of the cause of those incidents. In those instances where such reports are introduced as evidence in private litigation arising from the incident investigated, the competence and methods of the evaluating federal official are essential, and must be ascertained by the litigants involved.

Given the conflict between the law of the Fifth Circuit and that of the Tenth Circuit, the practical ability of the private litigant to obtain this critical evidence currently depends on in which federal appellate circuit

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[2]*Rosee* v. *Board of Trade, supra,* concerned a prohibitive regulation of the Department of Agriculture. In *McFadden* v. *Avco Corp.*, it was the Department of the Army; in *Swanner* v. *United States,* it was the Internal Revenue Service. And in *Reynolds,* the Department of the Air Force was the federal agency asserting the privilege.

the expert investigator can be subpoenaed. Federal officials residing in the Fifth Circuit can be fairly reached; those within the Tenth Circuit cannot.

The need for a national ruling on this important question is evident and can be satisfied only with this Court's review. Review of the judgment below is an appropriate and timely means to provide the uniformity needed.

III. Apart from its general and national importance, the question presented is crucial to Petitioner's defense in the underlying litigation in the Western District of Kentucky. The evaluative report admitted on behalf of claimants against the Petitioner is directed to this specific accident. The scientific conclusions are in some ways not favorable to Petitioner's position and will constitute evidence introduced against it at trial. Without an expeditious opportunity to test Dr. Christ's factual bases and scientific methods as well as the competence of his expert opinions, Petitioner will be effectively deprived of its right to cross-examine its accuser.

It is no balm to this Petitioner or others in its position that a detour to the District of Columbia might someday enable it to test this federal official's conclusions. The inevitable and substantial delay involved while the Kentucky litigation proceeds is but one aspect of the patent unfairness of the procedure insisted upon by the NBS and approved by the Court of Appeals. In *Saunders,* the Court itself lamented this predicament:

> The requirement on litigants to proceed only in the District of Columbia to obtain relief from agency action denying disclosure is a hardship. We see no reason why the claim of governmental privilege may not be determined as satisfactorily in a federal court removed from the District of Columbia as in a court that is there located.

396 F. 2d at 795.

The hardship on this Petitioner is severe, but not unique. Private litigants in at least the jurisdiction of the Court of Appeals for the Tenth Circuit have experienced and will experience similar hardships solely because of the unexplained requirement imposed by the law for which Petitioner now seeks review.

CONCLUSION

The judgment of the Court of Appeals imposes a real, present hardship on Petitioner. Its right to face and examine its accuser in the civil action in Kentucky has been effectively abrogated by that judgment, in conflict with the law prevailing in another circuit of the Court of Appeals. The need for a uniform rule throughout the federal judiciary is fairly and appropriately raised in this Petition. United States Steel Corporation urges the Court to grant review and resolve this conflict, as only the Supreme Court of the United States can.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

No. 80-1647

UNITED STATES STEEL CORPORATION, - *Plaintiff-Appellee,*

v.

GOBEL MATTINGLY, Et Al., - - - - *Defendants,*

EUGENE E. MORRIS, Et Al., - - - - *Plaintiffs,*

v.

GOBEL MATTINGLY, Et Al., - - - *Defendants,*
BRUCE W. CHRIST, - - - *Respondent-Appellant.*

Appeal from the United States District Court
for the District of Colorado

Before: BARRETT, BREITENSTEIN, and DOYLE, Circuit Judges.

This matter is before the Court on the motion of appellee, United States Steel Corporation, to vacate the order of this Court granting the government's motion for temporary stay of the order of the United States District Court compelling enforcement of a subpoena directed by United States Steel Corporation against appellant, Bruce W. Christ, an employee of the Bureau of Standards.

Upon consideration of the record, the briefs, and the oral arguments, we have concluded that the motion of

United States Steel Corporation for vacation of our temporary stay must be denied and that the merits of this dispute are controlled by *United States ex rel. Touhy* v. *Ragen,* 340 U. S. 462 (1951) and *Saunders* v. *The Great Western Sugar Company,* 396 F. 2d 794 (10th Cir., 1968). Thus, we hold that the District Court erred in enforcing the subpoena.

The judgment of the District Court is reversed and the cause is remanded with directions to recall the subpoena and dismiss all proceedings with regard thereto.

Howard K. Phillips, Clerk

APPENDIX B

IN THE

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLORADO

Civil Action No. 79-X-188

UNITED STATES STEEL CORPORATION, - - *Plaintiff,*

v.

GOBEL MATTINGLY, Et Al., - - - *Defendants,*

EUGENE E. MORRIS, Et. Al. - - - - *Plaintiffs,*

v.

GOBEL MATTINGLY, Et Al., - - - *Defendants.*

AMENDED ORDER ON PLAINTIFF'S MOTION TO COMPEL SUBPOENA COMPLIANCE

THIS MATTER is before the Court on the motion of the plaintiff, United States Steel Corporation (USS), to compel subpoena compliance by a National Bureau of Standards (NBS) employee, Dr. Bruce Christ (Christ).

The motion has been occasioned by litigation, in state and federal courts in Kentucky, arising from the explosion or rupture of a large steel cylinder manufactured by USS. The accident, which occurred on October 27, 1977, killed two men, injured four others, and damaged property.

Shortly after the mishap, public and private investigators appeared on the scene to ascertain the cause. USS contends that the Kentucky State Fire Marshall assumed control of the accident scene, and that the Department of Transportation appointed Christ as its principal investigator. Thereafter, USS claims, access to the accident scene

and evidence was restricted and cylinder fragments were impounded. In his affidavit, Christ disputes those allegations and asserts that he did not participate in the investigation until eight weeks after the explosion. Moreover, he denies that he was DOT's chief investigator. Christ further denies that cylinder fragments were impounded for him and he denies that access to either the accident site or the evidence was restricted. In any event, Christ authored a report with findings and conclusions adverse to USS.

Meanwhile, wrongful death and personal injury actions had been filed against USS in Kentucky. USS, in a consolidated action in the United States District Court for the Western District of Kentucky, has sued for contribution and indemnity for any amounts it has paid for settlements or may have to pay in those lawsuits. Even though USS nominally is a plaintiff in the contribution and indemnity action, its actual position is that of a defendant facing potential liability for sizeable damages occasioned by the deaths, injuries and property losses.

After the federal judge assigned to USS' contribution and indemnity action ruled that Christ's report would be admissible as evidence against USS in the trial of that case, USS sought to depose Christ and have him produce documents relating to his report. Although USS subpoenaed Christ, NBS' legal adviser instructed him not to comply with the subpoena. In asking this Court to compel subpoena compliance, USS has filed an affidavit asserting that Christ used "information, data and actual materials" which were not available to USS and, since they were destroyed during testing, cannot now be made available to USS. Thus, USS maintains that Christ's deposition and the documents it seeks to discover constitute the only sources of information it must have to meet and defend against Christ's report when it is introduced as evidence in the contribution and indemnity action.

Were it not for Christ's status as an employee of NBS he would unquestionably be subject to the same rule of law that governs other mortals and would not be heard to refuse to testify to facts and opinions within his ken. The question for decision is whether the NBS may confer on its employees and their files a privileged status exempting them from the general law governing duties of witnesses to comply with subpoenas and produce evidence needed by the courts.

Before having the subpoena served, USS had asked NBS' legal adviser to authorize Christ's testimony and allow him to produce the requested documents. That request was made pursuant to an NBS rule that:

> "[n]o NBS employee shall give testimony in any legal proceeding in which the United States Government or an agency . . . is not a named party . . . nor produce any data, information, or record created or acquired by NBS as a result of the discharge of its official duties without the prior written authorization of the NBS Legal Adviser." 15 C.F.R. Section 275.2 (1979).

In spite of the above mentioned ruling by the district court in Kentucky, that Christ's report will be admissible at the trial, NBS persists in refusing USS' discovery requests. Having reviewed the entire file and considered the briefs in light of the precedents granting trial judges very broad discretion over discovery matters in order to advance the interest of justice, I have concluded that this Court's subpoena shall be enforced.

I.

In establishing the NBS, Congress authorized the Secretary of Commerce to "make regulations regarding . . . such other matters as he may deem necessary for carrying this Act into effect." 15 U.S.C. Section 277. Under a com-

merce department organization order, the NBS Director was delegated power to perform those general functions. *See* Department Organization Order 30-2A, Section 3.01b. Apparently relying on the broad language of § 277 as its only source of authority, NBS has adopted and promulgated rules establishing a policy that:

> "[i]ts employees shall not testify nor otherwise appear in legal proceedings not involving the United States or its officers or employees in their official capacity as a named party in order to produce data, information, or records which concern matters related to official duties of NBS employees or the functions of NBS." 15 C.F.R. Section 275.1(c) (1979).

NBS asserts that such controls on employee testimony are necessary to preserve its neutrality and prevent undue disruption of its employees' work routines.

The standard of review applicable to the bureau's regulations restricting employee testimony and document production is whether they exceed "statutory authority or [are] . . . 'arbitrary, capricious, an abuse of discretion or otherwise not in accordance with the law'." *Batterton* v. *Francis,* 432 U. S. 416, 425-26, 97 S. Ct. 2399, 53 L. Ed. 2d 448 (1977).

USS has presented compelling arguments that the NBS regulations are "not in accordance with the law," because they allegedly contravene the overriding principle of separation of powers. Indeed, neither the Supreme Court nor the Congress seems to have delegated to this executive branch bureau any authority to overrule established rules of evidence defining what evidence is privileged. Thus, if the outcome of this dispute were to hinge solely upon constitutional questions, the trend of case law would seem to favor USS' contentions. *See United States* v. *Nixon,* 418

U. S. 683, 707, 94 S. Ct. 3090, 41 L. Ed. 2d 1039 (1974); *Youngstown Sheet and Tube Co.* v. *Sawyer,* 343 U. S. 579, 635, 72 S. Ct. 863, 96 L. Ed. 1153 (1952) (Jackson, J., concurring); *Halperin* v. *Kissinger,* 401 F. Supp. 272, 275 (D.D.C. 1975). "Judicial control over the evidence in a case cannot be abdicated [constitutionally] to the caprice" of executive agency officials. *United States* v. *Reynolds,* 345 U. S. 1, 9-10, 73 S. Ct. 528, 97 L. Ed. 727 (1953). It is unnecessary, however, to reach the separation of powers issue in this case.

Other constitutional defects are apparent upon examining the arbitrary and capricious nature of the powers here claimed by NBS and the manner of their exercise in this case. The lack of procedures for hearing and standards for deciding when to allow testimony and when not, the discrimination in favor of litigants involved in cases where the United States happens to be a party (whether or not its interests are involved in the discovery being sought), and the lack of an appeal, all raise fundamental questions. This case, however, can be decided without reaching the constitutional issues, and they will be reserved for another day. The obvious ground for decision is that 15 U.S.C. Section 277 despite NBS' contrary assertions, provides no authority whatsoever for NBS to restrict the availability of evidence in a judicial proceeding or to confer a testimonial privilege on its employees or records.

In discerning whether Congress intended to vest the NBS Director with authority to obstruct efforts of the courts to ascertain the truth through discovery, it is instructive to examine the history of one of 15 U.S.C. Section 277's statutory analogues. Originally, an executive department head was authorized to "prescribe regulations for the government of his department, the conduct of its employees, the distribution and performance of its business, and the custody and use of its records, papers and property."

5 U.S.C. Section 22.[1] In 1958, Congress amended that general housekeeping statute by adding the following new sentence: "This section does not authorize withholding information from the public or limiting the availability of records to the public." Pub. L. No. 85-619, 72 Stat. 547 (1958), codified in 5 U.S.C. Section 22 (current version in 5 U.S.C. Section 301 (1979)). The purpose of this amendment was to prevent government administrators and other bureaucrats from using the statute as a basis for withholding information. H. R. Rep. No. 1461, 85th Cong., 2d Sess., *U. S. Code Cong., & Ad. News* 3352, 3353 (1958).

Given the general congressional policy against concealing or blocking access to information obtained through expenditure of public funds, it is unlikely that Congress would have empowered NBS to obstruct access to information, or suppress evidence needed by the courts, without expressing such an intent in a specific provision to that effect. Congress itself has observed that when "a specific area of information must be closed to the public, legislation has been enacted accomplishing this purpose." *Id.* at 3352.

Following the guide of that congressional commentary, it becomes necessary to determine whether Congress has expressly authorized creation of a new testimonial privilege by administrative fiat. A review of the Federal Rules of Evidence, and the reports of congressional committees which dealt with those rules insofar as they concern testimonial privileges, reveals no existence of, or basis for claiming, a "bureaucratic inconvenience privilege" in federal courts. *See* Fed. R. Evid. Rule 501 and annotated committee reports (West 1979).

Indeed it seems highly unlikely that, in this era of open records and public meetings requirements, Congress would

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[1]The law which first was codified in 1875, was originally enacted in 1789. H.R. Rep. No. 1461, 85th Cong., 2d Sess., *U. S. Cong. & Ad. News* 3352 (1958).

have authorized any federal bureau to conceal information from the sunshine of public disclosure absent some special circumstances evidencing compelling need. On the contrary, Congress, by modifying 5 U.S.C. Section 22 and enacting the Freedom of Information Act,[2] has endeavored to make federal agency information and files more accessible to the public. The bureau's rules, in addition to totally lacking support in any express grant of privilege, violate the prevailing congressional spirit that "disclosure of material in government files has now become the rule, not the exception." *Stokes* v. *Brennan*, 476 F. 2d 699, 700 (5th Cir. 1973).

As a matter of fundamental fairness, too, NBS' position is untenable. Its employee's opinion, bearing the persuasive imprimatur of an official government report, has accused USS of causing multiple deaths, injuries and property losses. That report will be in evidence at the trial. It would be egregiously unfair to deny USS an opportunity to confront and cross-examine its accuser, to question his qualifications to render the opinions stated, to learn the facts on which his conclusions were based and test whether he mistakenly based conclusions on incorrect factual information, and to discover any prejudice which might undermine his credibility. Only through Christ's deposition can his report be tested and put into context in the trial. Only through discovery can the parties decide what — if any — of the documentary evidence they will offer at the trial. The trial court's duty to search for the truth cannot be frustrated by bureaucratic obstinancy.

Since the NBS regulations restricting access to evidence are "not rational and based on consideration of the relevant factors," they cannot weather judicial scrutiny. *FCC* v. *National Citizens' Committee for Broadcasting*, 436 U. S.

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[2] 5 U.S.C. Section 552 (1980).

775, 803, 98 S. Ct. 2096, 56 L. Ed. 696 (1978). Rather, this Court concludes that they are contrary to congressional intent and thus "not in accordance with law."[3] In the interest of justice these regulations cannot be allowed to preclude the discovery sought by USS.

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[3]The Government argues that the outcome of this case should be controlled by *United States* v. *Allen*, 554 F. 2d 398 (10th Cir. 1977) and *Saunders* v. *Great Western Sugar Co.*, 396 F. 2d 794 (10th Cir. 1968). The Court, however, finds those cases to be distinguishable.

In the *Allen* case, a criminal defendant in a pretrial hearing sought testimony from a United States Attorney. In refusing to testify, the United States Attorney referred to a Department of Justice regulation prohibiting employees, without departmental approval, from disclosing information or producing material acquired in the performance of official duties. *See* 28 C.F.R. Section 16.22 (1974). However, that regulation operated in conjunction with another rule requiring the party seeking the testimony to submit to the department a summary of the testimony desired. *See* 28 C.F.R. Section 16.23(c) (1974). The defendant had failed to deliver such a summary. In upholding departmental control over employee disclosures, therefore, the Court did so at least partly because of express procedural prerequisites that, in contrast to the instant case, were not met by the defendant. *See United States* v. *Allen*, 554 F. 2d 398, 406 (10th Cir. 1977).

In the *Saunders* case, defendants in an antitrust suit endeavored to subpoena information and documents from the Small Business Administration (SBA). SBA regulations regarding subpoena compliance were virtually identical to those of NBS in the instant case. *See* 13 C.F.R. Section 102.7, cited in *Saunders* v. *Great Western Sugar Co.*, 396 F. 2d 794, 794-95 (10th Cir. 1968). The Court, however, noted the plaintiff's argument that the information sought would be cumulative — a factor not existing in this case. Furthermore, the Court observed that "the defendants are entitled to disclosure unless governmental privilege forbids." *Id.* at 795. Since this Court has determined that no privilege exists for Christ, and the Government has conceded that the NBS regulations do not translate into a claim of privilege, the *Saunders* case actually undermines rather than enhances the force of the Government's argument.

ORDER

IT IS ORDERED that the plaintiff's motion for subpoena compliance is GRANTED. Bruce W. Christ is ordered to appear, and the National Bureau of Standards is ordered to produce the requested documents, at a time and place to be agreed upon by counsel, or, in the absence of such agreement as this court will order upon appropriate motion.

DATED at Denver, Colorado, this 23d day of May, 1980.

By the Court:

Jim R. Carrigan, Judge
United States District Court

APPENDIX C

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

No. 80-1647

UNITED STATES STEEL CORPORATION, - *Plaintiff-Appellee,*

v.

GOBEL MATTINGLY, Et Al., - - - *Defendants,*

EUGENE E. MORRIS, Et Al., - - - - *Plaintiffs,*

v.

GOBEL MATTINGLY, Et Al., - - - *Defendants,*
BRUCE W. CHRIST, - - - *Respondent-Appellant.*

Appeal from the United States District Court
for the District of Colorado

Before: SETH, Chief Circuit Judge; HOLLOWAY, McWILLIAMS, BARRETT, DOYLE, McKAY, LOGAN, and SEYMOUR, Circuit Judges.

This matter comes on for consideration of appellee's petition for rehearing and recall of mandate and suggestion for rehearing en banc.

Upon consideration whereof, the petition for rehearing and for recall of mandate is denied by the judges who were members of the panel that rendered the decision sough[t] to be reheard.

The suggestion for rehearing en banc having been transmitted to the members of the panel and to the judges of the Court who are in regular active service and no judge in regular active service or judge who was a member of the panel that rendered the decision having requested a vote on the suggestion for rehearing en banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing en banc is denied.

Howard K. Phillips, Clerk

APPENDIX D

15 CFR, PART 275
(Pertinent Portions)

POLICIES AND PROCEDURES GOVERNING THE APPEARANCE OF NBS EMPLOYEES AS WITNESSES IN PRIVATE LITIGATION

§ 275.1 Purpose and Policy.

(a) This part prescribes the policies and procedures of the National Bureau of Standards (NBS) with respect to testimony by NBS employees and production of data, information and records, in legal proceedings not involving the United States as a named party.

* * *

(c) To carry out its statutory mission effectively, NBS must apply the expertise of the many scientific and technical experts it employs exclusively to the performance of its official duties, including providing scientific and technical advisory services to other Federal agencies. It is essential that NBS also maintain a policy of strict impartiality among private litigants, and that it ensure that its employees adhere to the responsibilities for which they were employed. To these ends, it is the policy of NBS that its employees shall not testify nor otherwise appear in legal proceedings not involving the United States or its officers or employees in their official capacity as a named party in order to produce data, information, or records which concern matters related to official duties of NBS employees or the functions of NBS.

(d) For purposes of this part, "legal proceeding" includes any civil or criminal proceeding before a court of law, administrative board or commission, hearing officer, or other body conducting a legal or administrative proceeding, or any discovery proceeding in support thereof, including depositions and interrogatories.

§ 275.2 Testimony or Production of Records by NBS Employees in Legal Proceedings Not Involving the United States as a Named Party.

No NBS employee shall give testimony in any legal proceeding in which the United States Government or an agency or department in the Executive Branch is not a named party, concerning official duties of an NBS employee or any function of NBS, nor produce any data, information, or record created or acquired by NBS as a result of the discharge of its official duties, without the prior written authorization of the NBS Legal Adviser.

* * *

§ 275.4 Request or Order for Testimony or Production of Records.

(a) A request or order for testimony of, or the production of data, information, or records by, an NBS employee in a legal proceeding not involving the United States as a named party shall be addressed to the NBS Legal Adviser, National Bureau of Standards, Washington, D.C. 20234. A request or order for testimony shall be accompanied by an affidavit or, if that is not feasible, a statement setting forth the title of the case, the forum, the party's interest in the case, a recitation of the reasons for desiring and the intended use of the testimony, a general summary of the testimony desired, and a showing that (1) the desired testimony is not reasonably available from other sources (including an explanation of such circumstances), and (2) no NBS record in certified form provided under § 275.3 could be introduced in evidence in lieu of the testimony or other appearance requested.

(b) Any employee of NBS who is served with a subpoena or other order for or who receives a request for, testimony or the production of data, information, or records shall immediately report the service or request to the NBS Legal Adviser.

§ 275.5 Response to Request or Order for Testimony or Production of Records.

(a) Except for the production of payroll, leave, or similar administrative records that may be involved in legal proceedings involving an employee of NBS in other than that employee's official capacity, testimony or the production of data, information, or records in a legal proceeding not involving the United States shall be authorized only as a rare exception. Such exception shall be based only upon a determination by the NBS Legal Adviser that NBS has a significant interest in the legal proceeding and that the outcome may affect the implementation of present policies, or where other circumstances or conditions (including the showing required in paragraph (a) of § 275.4) make it necessary to provide the data, information, or records in the public interest.

(b) When an NBS employee receives a request or order for testimony or the production of data, information, or records, the NBS Legal Adviser shall determine whether such request or order is legally binding on the employee and whether compliance with such request or order is authorized. Upon making such determination, the NBS Legal Adviser shall accordingly instruct the employee who received such request or order.

(c) Unless otherwise expressly authorized by the NBS Legal Adviser, an employee who is requested or ordered to testify or produce data, information, or records in a legal proceeding not involving the United States as a named party shall respectfully decline to comply on the ground of the prohibition against compliance contained in this part. If a subpoena or other order is involved, the employee shall decline by appearing at the time and place specified (unless the NBS Legal Adviser determines, in consultation with the party seeking the testimony or other appearance, or the

authority conducting the legal proceeding, as appropriate, that a written submission will be sufficient), accompanied by a representative of the Office of the NBSA Legal Adviser, the United States Attorney's Office, or the Department of Justice, as appropriate, and explaining to the authority conducting the legal proceeding that this part prohibits the employee from complying.

(d) If an employee who follows the procedure in paragraph (c) of this section is ordered to show cause why he or she should not be cited for contempt, the NBS Legal Adviser shall request the Department of Justice to represent the employee.

(e) If the NBS Legal Adviser authorizes the testimony of an NBS employee, the Legal Adviser may arrange for the taking of the testimony by methods that are less disruptive of official activities of the employee than providing testimony in court or at a hearing. Testimony may, for example, be provided by affidavits, answers to interrogatories, written depositions, or depositions transcribed, recorded, or preserved by any other method allowable by law. Costs of providing testimony, including transcripts, one copy of which will be provided to the NBS Legal Adviser, will be borne by the party requesting the testimony. Such costs shall also include reimbursing NBS for the usual and ordinary expenses attendant upon the employee's absence from his or her official duties in connection with the legal proceeding, including the employee's salary and applicable overhead charges and any necessary travel expenses.